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DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

7 CFR Part 652

Technical Service Provider Assistance

AGENCY: Natural Resources Conservation Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This rulemaking amends the technical service provider assistance rule, 7 CFR Part 652, published in the Federal Register on November 21, 2002, by setting forth the United States Department of Agriculture (Department) process for establishing payment rates for program participant acquisition of technical services. In addition, this rulemaking sets forth the Department's policy regarding subcontracting by technical service providers in the course of their delivery of technical services and amends 7 CFR Part 652 accordingly. Finally the Department is using the opportunity presented by this rulemaking to clarify its policy regarding the certification process, to amend the definition of technical service provider in 7 CFR 652.21, and to amend the dates for submitting an Application for Certification in 7 CFR 652.21(f) and (d). The Natural Resources Conservation Service (NRCS) seeks comments from the public on this interim final rule.

DATES: Effective date: [insert date of publication in the Federal Register]. The comment period for the Technical Service Provider Assistance Interim Final Rule published on November 21, 2002 (Vol. 67, No. 225) is hereby extended. Comments must be received by [insert date of 30 days after date of publication in the Federal Register]. Comments on this amendment must be received by [insert date of 90 days after publication in the Federal Register].

ADDRESSES: Send comments by mail to Melissa Hammond, Technical Service Provider Coordinator, Natural Resources Conservation Service, P.O. Box 2890, Washington, D.C. 20013, or by e-mail to: melissa.hammond@usda.gov, Attention: Technical Service Provider Assistance. This interim final rule may also be accessed via the Internet through the NRCS homepage at <http://www.nrcs.usda.gov>, by selecting Farm Bill 2002.

FOR FURTHER INFORMATION CONTACT: Melissa Hammond, Technical Service Provider Coordinator, Strategic Natural Resource Issues Staff, NRCS, P.O. Box 2890, Washington, D.C. 20013-2890; telephone: (202) 720-6731; fax: (202) 720-3052; submit e-mail to: gary.gross@usda.gov, Attention: Technical Service Provider Assistance.

SUPPLEMENTARY INFORMATION:

Discussion

Payment Rates

As indicated in the preamble section of the technical service provider interim final rule, 7 CFR Part 652, the Department is publishing this interim final rule, which amends the technical service provider rule, in order to set forth the Department's method of setting payment rates for technical service provider reimbursement. Accordingly, this rulemaking adds a new paragraph (j) to Section 652.5 of the existing technical service provider rule, and adds a new paragraph (h) to Section 652.4, which addresses the use of subcontractors. This rulemaking also clarifies the Department's policy regarding the certification process set forth in the interim final rule at 7 CFR Part 652.21.

The Department will determine payment rates by setting not-to-exceed rates for technical services. The Department may use some of the methods set forth in the preamble of the interim final rule, 7 CFR Part 652, when calculating these rates, including conducting a national survey

of technical service providers and vendors who provide technical services to determine their price data for actual services performed and using NRCS's own cost of providing technical services. In addition, when determining not-to-exceed rates, NRCS may use other sources of data that it determines are reliable, including its own cost of procuring technical services. The Department chose this method to set the technical service not-to-exceed rates because it provides direct input from the marketplace.

For at least the first year of implementation of the technical service provider process, one of the methods NRCS will use to obtain cost data is directly from technical service providers through the existing Internet-based posting system called FedBizOpps. Through a notice on the NRCS website, and using existing agency mailing lists, the Department will be requesting providers to respond to a solicitation posted at the FedBizOpps website, <http://www.fedbizopps.gov/>, for cost data related to specific categories of technical services and specific geographic areas. The Department anticipates that it will post this solicitation by March 1, 2003. Any price data collected from technical service providers and vendors with the national survey is for informational purposes only to assist the Department in establishing payment rates for technical services. Submission of price data by the provider does not obligate the Department, nor does it guarantee the provider the award of a specific contract by any program participant or the Department for carrying out technical services.

NRCS will analyze the pricing information submitted through FedBizOpps, and that obtained from other sources, using a standardized methodology. Not-to-exceed payment rates will be established nationally on a State by State basis for categories of technical services. To ensure consistency across State lines, NRCS will coordinate payment rates between adjacent States where similar resource conditions and agricultural operations exist, taking into account

differences in State laws, the cost of doing business, competition, and other variables. NRCS may subsequently adjust the rates, as needed on a case by case basis, during program implementation in response to unusual conditions or unforeseen circumstances, such as services provided for highly complex technical situations, emergency conditions, serious threats to human health or the environment, or major resource limitations. In these cases, NRCS will set a case-specific not-to-exceed payment rate. The Department will review the Technical Service Provider system, including the certification, payment, and technical service quality evaluation processes, by March 1, 2004.

In order to encourage participants to consider price in their selection of technical service providers, NRCS may provide program participants, who select technical service providers with prices below the not-to-exceed rate, with a credit of 50 percent of the technical service savings to apply toward their cost of practice installation. Specifically, the program participant would receive 50 percent of the cost savings of the difference between the not-to-exceed rate and the actual billing for the technical services provided. For example, if the not-to-exceed rate for technical services for a conservation practice is \$10,000, and the participant chooses a provider whose service costs \$9,000, the participant has earned a \$500 credit toward the cost of practice installation. Assuming the participant's application has been selected for funding, the practice to be installed cost \$20,000, and the cost share requirement is 50 percent, then the participant's cost share of the practice would be \$9,500. Using this incentive system, both the participant and the Federal government enjoy a net savings, and the end result is a more efficient and cost-effective process.

Under no circumstances may the earning of credits by a participant result in the Department exceeding any statutory limitation on cost-sharing or payments for a particular

program. Additionally, the earning of credits has no bearing on whether an application for financial assistance (installation of conservation practices) is selected. Consequently, the credit system will not result in a violation of any statutory prohibition against “bidding down,” (i.e., using cost as the deciding factor when choosing among applications that are expected to yield comparable environmental benefits).

NRCS believes that this dynamic approach to setting not-to-exceed payment rates and providing incentives to program participants to choose competitively priced services will help ensure that its payment rates do not lag behind the development of technological efficiencies that decrease the time and cost associated with the delivery of technical services.

NRCS is interested in receiving comments on any aspect of payment rates included in this rulemaking amendment or any other items regarding payment rates.

Use of Subcontractors by Technical Service Providers

Technical service providers may not always have the expertise needed to carry out all aspects of delivering technical services for conservation practices or for conservation planning. Therefore, in order to make efficient use of the marketplace, technical service providers contracted to carry out technical services may use the services of subcontractors who are certified by NRCS for the specific technical services or expertise needed. The contracted technical service provider remains responsible for the overall technical services provided. In addition, subcontracted technical service providers are responsible for providing services in accordance with the terms of their Certification Agreement. Technical service providers will not be reimbursed if they subcontract with entities that are not certified providers for the particular technical services which they are providing.

National Certification

The Department is using the opportunity presented by this rulemaking to clarify its policy regarding the certification process set forth in the interim final rule at 7 CFR Part 652. The technical service provider certification process is a national certification process with uniform criteria and requirements; see 7 CFR Part 652.21. Applicants can apply for certification to the Chief, NRCS, through the agency's TechReg web site using one application, and listing each State for which the applicant wishes to be considered for certification. Applicants must meet the certification criteria for each category of technical services in which they desire certification.

Applicants are required to self-certify that they meet all applicable State licensing or similar requirements for those technical services where certification is sought for each State. Applicants for certification must demonstrate, through documentation of training or experience, familiarity with NRCS guidelines, criteria, standards, and specifications as set forth in the applicable NRCS manuals, handbooks, field office technical guides, and supplements thereto, for planning and applying specific conservation practices and management systems for which certification is sought. In addition to National and State NRCS guidelines and criteria, applicants must also be familiar with any unique criteria required at the county level for particular practices before providing services in a particular county. By signing a Certification Agreement, applicants are acknowledging that they are aware of these local criteria, and agree to familiarize themselves with any such criteria by contacting the appropriate NRCS State official before providing technical services. In order to be considered for certification, the applicant must submit a completed Certification Application to NRCS electronically through the TechReg web site. The Department encourages applicants and certified technical service providers to participate in NRCS sponsored trainings at the State and local level in order to gain familiarity

with NRCS local criteria and guidelines, as well as to stay current on new developments in agency policy related to the provision of technical services.

NRCS is amending the definition of technical service provider to reflect national certification. NRCS is also revising the dates from March 1, 2003, to June 1, 2003, for submitting an application regarding conditional certifications in section 652.21(f) and (g).

Request for Comments

NRCS is extending the comment period for the Technical Service Provider Assistance Interim Final Rule published on November 21, 2002, Vol. 67, No. 225, for 30 days. Comments must be received by the date indicated at the beginning of this amendment. Comments on this amendment must be received within 90 days after publication in the Federal Register in accordance with the date indicated at the beginning of this amendment.

NRCS is interested in receiving additional feedback from the public on the following issues.

Whether governing board members of a public agency should or should not be engaged as private consultant technical service providers or as technical service providers under the auspices of that public agency.

Whether or not there should be a maximum number of uncertified employees serving under the direction of a certified individual within a private-sector entity, or a public agency where that certified individual warrants the work of those uncertified employees and what that maximum number should be.

Regulatory Certifications

Executive Order 12866

Pursuant to Executive Order 12866 (58 FR 51735, October 4, 1993), it has been determined that this interim final rule is a significant regulatory action, and has been reviewed by the Office of Management and Budget (OMB). Pursuant to Section 6(a)(3) of Executive Order 12866, NRCS conducted an economic analysis of the potential impacts associated with the interim final rule for Technical Service Provider Assistance published in the Federal Register on November 21, 2002, and included the analysis as part of a Regulatory Impact Analysis document prepared for that interim final rule. The provisions of this interim final rule do not alter the analysis that was originally prepared. A copy of the analysis is available upon request from Gary Gross, Resource Conservationist, Natural Resources Conservation Service, P.O. Box 2890, Washington, D.C. 20013-2890; or by e-mail to gary.gross@usda.gov, Attention: Technical Service Provider Assistance – Economic Analysis; or at the following web address:

<http://www.nrcs.usda.gov>.

Executive Order 12988

This interim final rule has been reviewed in accordance with Executive Order 12988. The provisions of this interim final rule are not retroactive. The U.S. Department of Agriculture (USDA) has not identified any State or local laws that are in conflict with this regulation, or that would impede full implementation of this rule. In the event that such conflict is identified, the provisions of this interim final rule preempt State and local laws to the extent that such laws are inconsistent with this rule.

Regulatory Flexibility Act

The Regulatory Flexibility Act is not applicable to this rule because the Secretary of Agriculture is not required by 5 U.S.C. 553 or any other provision of law to publish a notice of proposed rulemaking with respect to the subject matter of this rule.

National Environmental Policy Act

The regulations promulgated by this rule do not authorize any action that may negatively affect the human environment. Accordingly, an analysis of impacts under the National Environmental Policy Act, 42 U.S.C. 4321 et seq., has not been performed. This interim final rule will help implement new and existing USDA conservation programs, which are subject to the environmental analyses pursuant to the National Environmental Policy Act.

Paperwork Reduction Act

Section 2702 of the Farm Security and Rural Investment Act of 2002 requires that the promulgation of regulations and the administration of Title II of said Act, which authorizes the use of certified technical service providers, be carried out without regard to Chapter 35 of Title 44 of the United States Code (commonly known as the Paperwork Reduction Act). Accordingly, these regulations, related forms, and other information collection activities needed to establish payment rates under these regulations, are not subject to review by the Office of Management and Budget under the Paperwork Reduction Act.

NRCS is committed to compliance with the Government Paperwork Elimination Act (GPEA) and the Freedom to E-File Act, which require government agencies, in general, to provide the public with the option of submitting information or transacting business electronically to the maximum extent possible, and to NRCS in particular. The forms and other information collection activities required for participation in technical services delivery under the technical service provider assistance rule, amended by this rule, are not fully implemented for the public to conduct business with NRCS electronically. However, the required standard forms discussed in this rule will be available electronically through the USDA eForms website,

at www.sc.egov.usda.gov, for downloading. The regulation will be available at the NRCS homepage at www.nrcs.usda.gov.

Unfunded Mandates Reform Act of 1995

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995, Public Law 104–4, NRCS assessed the effects of this rulemaking action on State, local, and tribal governments, and the public. This action does not compel the expenditure of \$100 million or more by any State, local, or tribal governments, or anyone in the private sector; therefore, a statement under Section 202 of the Unfunded Mandates Reform Act of 1995 is not required.

Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994

Pursuant to Section 304 of the Department of Agriculture Reorganization Act of 1994, Public Law 104–354, USDA classified this interim final rule as not major.

Civil Rights Impact Analysis

A Civil Rights Impact Analysis was completed for the interim final rule for Technical Service Provider Assistance published in the Federal Register on November 21, 2002. The provisions of this interim final rule do not alter analysis that was originally prepared. The review revealed no factors indicating any disproportionate adverse civil rights impacts for participants in NRCS programs and services who are minorities, women, or persons with disabilities. A copy of this analysis is available upon request from Gary Gross, Resource Conservationist, Natural Resources Conservation Service, P.O. Box 2890, Washington, D.C. 20013-2890; or by e-mail to gary.gross@usda.gov, Attention: Technical Service Provider Assistance – Civil Rights Impact Analysis; or at the following web address:

<http://www.nrcs.usda.gov>.

List of Subjects in 7 CFR Part 652

Natural Resources Conservation Service, Soil conservation, Technical assistance, Water resources.

For the reasons stated in the preamble, the Natural Resources Conservation Service hereby amends Title 7 of the Code of Federal Regulations as set forth below:

Accordingly, Title 7 of the code of Federal Regulations Part 652 is amended by adding a new paragraph.

Part 652 — Technical Service Provider Assistance

1. The authority citation for Part 652 continues to read as follows:

Authority: 16 U.S.C. 3842.

2. Section 652.5 is amended by revising paragraph (d) and adding a new paragraph (j) to read as follows:

§ 652.5 Program participant acquisition of technical services.

* * * * *

(d) To obtain payment for technical services, the program participant must submit to the Department an invoice, supporting documentation, and a request for payment. The Department may pay a program participant for technical services provided by a technical service provider hired by the program participant through a reimbursement payment made directly to the program participant; or upon receipt of an assignment of payment from the program participant, a payment made directly to the technical service provider.

* * * * *

(j) Payment rates.

(1) NRCS will establish payment rates by calculating not-to-exceed rates for technical services. NRCS will calculate not-to-exceed rates using price data that it may acquire through various sources that it deems reliable.

(2) Establishing not-to-exceed payment rates.

(i) NRCS will analyze the pricing information using a standardized methodology.

(ii) Not-to-exceed payment rates will be established nationally on a State by State basis for categories of technical services.

(iii) NRCS will coordinate payment rates between adjacent States to ensure consistency where similar resource conditions and agricultural operations exist. Payment rates may vary to some degree between States due to differences in State laws, the cost of doing business, competition, and other variables.

(iv) NRCS will review payment rates annually, or more frequently as needed, and adjust the rates based upon data from existing contracts, Federal cost rates, and other appropriate sources.

(v) NRCS may adjust payment rates, as needed, on a case-by-case basis, in response to unusual conditions or unforeseen circumstances in delivering technical services such as highly complex technical situations, emergency conditions, serious threats to human health or the environment, or major resource limitations. In these cases, NRCS will set a case-specific not-to-exceed payment rate based on the Department's determination of the scope, magnitude, and timeliness of the technical services needed.

(3) Cost share credits. In order to encourage competitive pricing, a program participant may earn credits toward their cost-share for practice installation under a program contract when a participant selects a technical service provider with prices below the not-to-exceed rates for the

provision of technical services. The credits earned will be equal to a percentage of the savings generated by the participant by choosing a lower cost technical service provider. However, in no cases may the application of cost share credits to a program contract result in the Department exceeding any statutory limitations on cost sharing or payments for a particular program.

3. Section 652.4 is amended by adding a new paragraph (h) to read as follows:

§ 652.4 Technical service standards.

* * * * *

(h) Technical service providers may utilize the services of subcontractors to provide specific technical services or expertise needed by the technical service provider, provided that the subcontractors are certified by NRCS in accordance with this part for the particular technical services to be provided and the technical services are provided in terms of their Certification Agreement. Payments will not be made for any technical services provided by uncertified subcontractors.

4. Section 652.1 is amended to revise the definition of technical service provider to read as follows:

* * * * *

Technical service provider means an individual, entity, or public agency certified by NRCS and placed on the approved list to provide technical services to program participants or to the Department.

5. Section 652.21 (f) and (g) are amended to read as follows:

* * * * *

(f) An individual, private-sector entity, or public agency is conditionally certified provided they had entered into a contract, cooperative agreement, or contribution agreement with

the Department prior to [insert publication date of this interim final rule] to provide technical services and they submit an Application for Certification by June 1, 2003. An individual, private-sector entity, or public agency with conditional certification status under this paragraph may continue to provide technical services in accordance with the terms and conditions of the above-described contract, cooperative agreement, or contribution agreement. Conditional certification shall expire either by the date NRCS and the individual, private-sector entity, or public agency enter into a Certification Agreement, as described in §652.22(c)(1) or September 30, 2003, whichever is earlier.

(g) An individual is conditionally certified if the individual was certified under NRCS policy in effect prior to [insert publication date of this interim final rule] and submits an Application for Certification by June 1, 2003. An individual with conditional certification status under this paragraph may continue to provide technical services to the Department and to program participants in accordance with the above-described prior certification. Conditional certification shall expire either by the date NRCS and the individual enter into a Certification Agreement, as described in §652.22(c)(1) or September 30, 2003, whichever is earlier.

Signed in Washington, DC on _____, 2003

BRUCE I. KNIGHT

Chief

Natural Resources Conservation Service